Filed 4/16/19 In re L.T. CA2/6

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

In re L.T., a Person Coming Under the Juvenile Court Law.	2d Juv. No. B293046 (Super. Ct. No. 17JV00195) (Santa Barbara County)
SANTA BARBARA COUNTY CHILD PROTECTIVE SERVICES, Plaintiff and Respondent, v. J.T., Defendant and Appellant.	

J.T., the presumed father of L.T., appeals from a juvenile court order terminating his parental rights and freeing the child for adoption. (Welf. & Inst. Code, § 366.26.)[1] During the dependency proceeding, appellant was in jail awaiting trial for the murder of L.T.'s mother. Appellant contends the trial court abused its discretion in denying a contested hearing on whether the beneficial parent-child relationship exception applies

[1] All statutory references are to the Welfare and Institutions Code unless otherwise stated.

(§ 366.26, subd. (c)(1)(B)(i)) and in finding that L.T. is a dependent child within the meaning of section 300, subdivisions (b) and (c). We affirm.

Procedural History

After appellant and L.T.'s mother separated, appellant stalked, harassed, and threatened mother in the presence of L.T for more than a year. Mother obtained multiple restraining orders to protect L.T., but it was to no avail. Mother was found shot to death on Easter Sunday, April 16, 2017. Hours later, the Santa Barbara County Sheriff detained and questioned appellant as the primary suspect.

Three days later, Santa Barbara County Child Welfare Services (CWS) filed an amended petition for failure to protect (§ 300, subd. (b)) and serious emotional damage (§ 300, subd. (c)). It was alleged that appellant had a history of domestic violence and prior arrests for battery on a spouse, assault with a deadly weapon, and robbery. The amended petition stated that appellant perpetrated multiple acts of domestic violence in front of L.T and was not supportive of L.T.'s therapy even though the child suffered severe anxiety, depression, withdrawal, and aggressive behavior.

Three days before the amended petition was filed, appellant was staying with his parents where L.T. was living. Law enforcement warned CWS there was a substantial risk that appellant would take L.T. and flee to Mexico as he had threatened to do in the past. CWS detained L.T. and placed her with the maternal grandparents. On April 19, 2017, appellant was arrested and charged with first degree murder of mother by lying in wait. CWS reported that appellant "is being held with no bail" and that the criminal court had issued a Criminal Protective

Order prohibiting appellant from contacting L.T. (Pen. Code, § 136.2.)

At the jurisdiction hearing, appellant submitted on the jurisdiction report but argued that L.T. should be placed with the paternal grandparents. The trial court sustained the petition, ordered reunification services, and ordered visitation for the paternal grandparents. Reunification services were terminated at the 12-month review hearing based on appellant's failure to follow the case plan or return calls and messages from CWS.

The matter for a section 366.26 permanent plan hearing, and CWS recommended that appellant's parental rights be terminated. In response, appellant filed an Offer of Proof stating that the beneficial parent-child relationship exception applied because "[t]here is a whole history of . . . contacts [appellant] had with [L.T.] before his incarceration. [Appellant] maintained a strong, consistent relationship with [L.T.]." The trial court found that the Offer of Proof was insufficient and terminated parental rights after appellant conceded that L.T. was adoptable.

Beneficial Parent-Child Relationship

Appellant contends that the trial court abused its discretion in denying his request for a contested hearing on the beneficial parent-child relationship exception. (§ 366.26, subd. (c)(1)(B)(i).) If a parent has failed to reunify and the trial court finds the child is likely to be adopted, the parent has a "heavy burden" of showing that the parent-child relationship outweighs the benefits of adoption. (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 575.) At the section 366.26 permanency planning hearing, the trial court can require that the parent make an offer of proof

so it can determine whether the parent has evidence of significant probative value to warrant a contested hearing on the beneficial parent-child relationship exception. (*In re Tamika T.* (2002) 97 Cal.App.4th 1114, 1122.) "The offer of proof must be specific, setting forth the actual evidence to be produced, not merely the facts or issues to be addressed and argued." (*Id.* at p. 1124.)

The beneficial parent-child relationship exception has two elements. First, appellant must show he maintained regular contact and visitation with L.T., and second, that L.T. would benefit from continuing the relationship. (*In re Autumn H.*, *supra*, 27 Cal.App.4th at p. 575.) "[T]he parent must prove he or she occupies a parental role in the child's life, resulting in a significant, positive emotional attachment of the child to the parent. [Citations.]" (*In re Valerie A.* (2007) 152 Cal.App.4th 987, 1007.)

The trial court did not address the first element – regular contact and visitation - because appellant was in custody awaiting a criminal trial and subject to a no contact order which prohibited visitation. The second element required a showing that appellant's relationship with L.T. was so beneficial and nurturing, that it outweighed the benefit of adoption. (*In re Autumn H.*, *supra*, 27 Cal.App.4th at p. 575.) The Offer of Proof stated "[t]here is a whole history of . . . contacts [appellant] had with [L.T.] before his incarceration. He maintained a strong, consistent relationship with her."

The trial court found that the Offer of Proof was insufficient. There was no abuse of discretion. It was uncontroverted that appellant committed acts of domestic violence in L.T.'s presence and encouraged L.T. to hit mother and

call her a "puta" and "whore." Appellant told L.T. that he was going to kill mother because she no longer loved him. During a visitation exchange, appellant threatened to kill the maternal grandfather and, at a second visitation exchange, appellant attempted to hit the maternal grandmother in the presence of L.T. A psychological evaluation stated that appellant has "demonstrated an inability to refrain from domestic violence while the child was present" and was not supportive of L.T.'s emotional development.

L.T. suffered from and was treated for severe emotional harm, separation anxiety, and abandonment issues. After mother's homicide, L.T. rarely mentioned appellant, did not believe that appellant loved her, and did not want to see appellant. L.T. told her therapist that she felt threatened by appellant and "'I want him to go away.'" Before the section 366.26 hearing, L.T. told a CASA worker that "'I don't want to talk to my Dad. He killed my Mom and that makes me mad. I knew he would, because he always used to tell me he'd kill her.'"

Appellant, in his opening brief, states that his relationship with mother "was ugly at best. It was marked by some pretty nasty tactics by appellant including encouraging the minor to call her mother a 'puta' or 'whore.' Whether in English or Spanish, such language is simply not acceptable for a man to teach his young daughter to call her mother." That is the antithesis of a nurturing parent-child relationship. The Offer of Proof is bereft of any credible evidence that appellant played a positive parenting role or that L.T. had a positive emotional attachment to appellant. (*In re Derek W.* (1999) 73 Cal.App.4th 823. 827.) "Because a parent's claim to such an exception is evaluated in light of the Legislature's preference for adoption, it

is only in exceptional circumstances that a court will choose a permanent plan other than adoption. [Citation.]" (*In re Scott B.* (2010) 188 Cal.App.4th 452, 469.)

Jurisdictional Finding That Minor Is A Dependent Child

Appellant argues that the trial court lacked jurisdiction to proceed with the section 366.26 hearing because L.T. is not a dependent child described by section 300. (§ 355, subd. (a).) Appellant, however, did not object on that ground at the jurisdiction and disposition hearings, or appeal the disposition order. (§ 395; see *In re James J.* (1986) 187 Cal.App.3d 1339, 1342 [jurisdictional finding may be reviewed in appeal from dispositional order].) Having waived the claim, appellant is precluded from challenging the jurisdictional findings at this late a date. (*In re Meranda P.* (1997) 56 Cal.App.4th 1143, 1150.) Appellant's "assault on the . . . jurisdictional finding comes too late." (*In re Megan B.* (1991) 235 Cal.App.3d 942, 950.)

Appellant argues that he was denied effective assistance of counsel because counsel failed to argue that the trial court could not consider appellant's arrest as a basis for finding jurisdiction. Those issues were discussed at the jurisdiction and disposition hearings. Appellant's trial attorney argued that that appellant was presumed innocent until proven guilty in the criminal case and the court "should make some kind of order that protects this little girl's interests to be able to see both sides of this family." The trial court agreed and found that until appellant was convicted, he was presumptively entitled to reunification services. The paternal grandparents were granted visitation. On the issue of jurisdiction, the trial court found that a prima facie showing had been made that appellant was in

custody for the alleged murder of mother, that a criminal protective order had already issued for appellant not to have contact with L.T., that appellant planned to flee the state before his arrest, and that L.T. suffered from or was at risk of suffering severe emotional damage. Based on appellant's acts of domestic violence in the presence of L.T., his threats to kill mother and abduct L.T., and his attempt to interfere with L.T.'s therapy, there was ample evidence to find that L.T. was a child described by section 300.

Appellant's remaining arguments have been considered and merit no further discussion. The imposition of juvenile dependency jurisdiction depends on the welfare of the child, not the fault or lack of fault of the child's parents. (*In re Vonda M.* (1987) 190 Cal.App.3d 753, 757.) The Sixth Amendment does not require trial counsel to make futile or frivolous objections at the jurisdiction and disposition hearings. (*People v. Memro* (1995) 11 Cal.4th 786, 834; see, *e.g.*, *In re Ernesto R.* (2014) 230 Cal.App.4th 219, 221 [attorney in dependency proceeding has no obligation to file a groundless 388 petition to modify an existing order].)

Disposition

The judgment (order terminating parental rights) is affirmed.

YEGAN, J.

We concur:

GILBERT, P. J. PERREN, J.

Arthur A. Garcia, Judge

Superior Court County of Santa Barbara

Christopher Blake, under appointment by the Court of Appeal for Defendant and Appellant.

Michael C. Ghizzoni, County Counsel, Lisa A. Rothstein, Deputy Counsel for Plaintiff and Respondent.